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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 550

ROBERT E. FUNKHOUSER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT E. FUNKHOUSER,
Petitioner,
5315 Colorado Avenue, N. W.,
Washington 11, D. C.

December 1, 1958.

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	App. C 5a
Statement of the Case	5
Reasons for Granting the Writ	22
Argument	22
Conclusion	23

Appendix

A—Opinion of Court Below	App. 1a
B—Order Denying Rehearing	App. 4a
C—Internal Revenue Laws Applicable	App. 5a

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The petitioner, Robert E. Funkhouser, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above entitled case decided on October 13, 1958.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is printed as Appendix A, *infra.*

The opinion of the United States District Court for for the District of Maryland is printed as Appendix C, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit (Appendix A, *infra*) was entered on on October 13, 1958.

Rehearing was denied on November 3, 1958 (Appendix B, *infra*).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

1. The main question in this case is; can a citizen of the United States be legally prosecuted, fined and imprisoned for income tax evasion before his income tax returns are inquired about, examined or audited to determine if there is any deficiency in tax due and owing. There was no examination of the returns filed; and no deficiency in tax was determined by the Commissioner and no tax was found due and owing as provided by the Internal Revenue Code of 1939.

The indictment charged that petitioner, Robert E. Funkhouser, by filing false and fraudulent income tax returns for each of the years 1943-1947 had evaded certain specified sums of income taxes due and owing to the United States.

At the trial Respondent testified that he found that Petitioner had reported all of his gross income and all expenses in the returns filed.

The gross income was accepted as filed; but the expenses, all listed in minute detail, and comprising over 30,000 individual items, were questioned to the extent of 200 items which were claimed to be not allowable

as deductions from gross income. They were charged as false and fraudulent.

Respondent then testified that he had not made any examination of the returns to determine the correct amount of the tax as required by Section 57 of the Internal Revenue Code of 1939. The prosecuting agent testified that he charged the items were false and fraudulent because he had disallowed them.

Petitioner claims that on those facts Respondent should have examined the returns as provided by the Code and should not have made these criminal Charges.

2. The record on appeal shows that Petitioner had reported all expenses claimed in greatest detail, in the returns filed. That of the 30,000 individual items reported 29,800 were found to be allowable without question. Over 99 34/100 per cent of the items were accepted without question. Only 200 or 66/100 of one per cent of the listed items were questioned and those were charged as false and fraudulent without the agent having made any examination of the returns or having determined the correct amount of the tax, or determining that a deficiency in tax did exist, or affording any opportunity to protest or appeal, or permitting any petition to the Tax Court for a redetermination of the tax charged as due, owing and evaded by the agent, without his having made any inquiry about the items, any tabulation of the items, any calculation of the items, any computation of the allowable depreciation on the property, any list of the items, or any attempt to analyze the items.

3. The Internal Revenue Code of 1939 sets up a definite and exact requirement for the determination of

the correct amount of the tax and when income tax returns have been filed which report all gross income and all expenses the statutory requirements of the code for the examination of those returns and the determination of the correct tax must be followed before there can be a prosecution and application of the penalties of Section 145(b) of the Code.

4. The decision of the District Court that a taxpayer can be convicted of income tax evasion by a jury's "bird's eye view of the situation" before there has been any examination of the returns to determine the correct amount of the tax; or any tabulation of the items listed on the returns, or any inquiry about the items was error, and resulted in an illegal sentence.

5. The record shows that when the returns complied with the requirements of the code that they should have been examined and the correct amount of the tax should have been determined before a criminal Court jury should have been told they "would be at liberty to find a verdict against him on one or more of the counts involved". It was error to set up any charges and counts before there was an examination of the returns.

6. It was error for the District Court to refuse to allow the Petitioner to present evidence that a proper examination of the returns disclosed that no tax was due, owing, or evaded, when the prosecution testified that no examination, audit, tabulation, calculation or inquiry had been made to determine the correct tax.

7. The Court below erred in its decision of October 13, 1958 when it said:

a. "The statute itself 'imposes the tax' ".

b. "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b)."

c. "The Appellant also argues that the Commissioner had not, prior to the prosecution, passed upon each of 30,000 claimed deductions. At the trial the Government did prove that, by making various false claims for deductions, a substantial understatement of taxable income in defendant's returns had occurred".

d. "The sentence imposed here is not illegal in the sense that it is in excess of the punishment authorized by Section 145(b)."

8. The application of the penalties of Section 145(b) without first having made any examination of the returns or the determination of the correct tax, or making any inquiry, audit, tabulation, calculation, computation, list, or any attempt to analyze the items charged as false or fraudulent was illegal.

STATEMENT OF THE CASE

I.

Petitioner was indicted under Section 145(b) of the Internal Revenue Code of 1939 on a charge of having evaded certain income taxes for the years 1943 through 1947. (Record on appeal)

The indictment and trial was had in the District Court for the District of Maryland before there was any examination of the returns filed by Petitioner to

determine the correct amount of the tax. (See Decision of Court below of October 13, 1958, Appendix A, *infra*).

Respondent made no examination of the returns and did not determine the correct amount of the tax. The Court below said:

> "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Section 145(b). (See decision of Court below Appendix A, *infra*).

This entire proceeding was based on an "assumption" by an agent of Respondent, that perhaps, some time in the future, an examination of the returns might be made; which future examination might disclose that some of the listed items of expense set out in the returns might not be ruled legally allowable as deductions from gross income; and that a deficiency in tax as defined by Section 271 of the Code might be then determined. That agent's "assumed" deficiency is charged in the indictment as tax, due, owing and evaded.

Respondent's agent testified that his examination into the returns consisted of securing the automobile license number of Petitioner's automobile and following that automobile about the roads for a "couple of weeks" (342)[1] until he waylaid the automobile near Petitioner's safety deposit box (342), that he inventoried the safe deposit box (345), and that thereafter he made no inquiry about the par-

[1] ( ) All references are to page number of the Transcript of Proceedings before the District Court for the District of Maryland unless otherwise specified.

ticular items listed as expenses on the returns (44), made no inquiry about the specific checks listed as expenses on the returns (382) made no tabulation of the items of expense listed on the returns (24), made no calculation of the items of expense listed on the returns (25), Made no computation for allowance of any depreciation on depreciable property listed on the returns (172, 416), and other Government witnesses testified that no list of the items of expense were ever made up (See record on appeal, page 84. Ex. page 61a), and "And realizing the enormity of attempting to analyze some 20 or 30 thousand individual items I told them that we would adopt the theory of the Cohan rule and split it down the middle" (See record on appeal, page 84, Ex. Page 56a).

The above quoted testimony of Respondent shows that he made no examination, inquiry, tabulation, calculation, computation, list or any attempt to analyze the items listed on the returns as a basis for any testimony or charges of fraud in this case. Respondent's witnesses testified they *failed* to do everything necessary to prove fraud charges.

The record on appeal shows that Respondent's agents testified that they had made no investigation or examination which would qualify them to charge that any tax was due or evaded on the returns filed by Petitioner.

II.

The record on appeal shows that Respondent testified that he had found that Petitioner had filed income tax returns in which Petitioner had reported all gross income (355), and the District Court so found:

> BY THE COURT: In this case the Government does not charge fraud on the part of the taxpayer in the failure to report gross income but only alleges fraud in making deductions from gross income". (Charge to the jury. Record on appeal page 41).

Now, since the record on appeal shows that all gross income was reported and there was no examination of the returns by the agents to secure any information about the items reported; let us examine the record to see exactly what kind of returns were filed by Petitioner.

The record on appeal shows that the books, records and returns showed a listing of 30,000 individual items of expense listed in the most minute detail. Respondent's description of the books and records and returns is set out in brief on pages 148, 149, 150, 152, 153 of the Record on appeal. And it is set out in elaborate detail in respondent's testimony on pages 10, 19, 20, 21, 30, 32, 33, 34, 140, 141, 142, 143, 175, 177, 178, 206, 207, 262, 263, 264, of the Transcript of Proceedings before the District Court.

The testimony of Respondent's agents cited above shows that the returns were concise, clear, detailed and clearly listed every one of the 30,000 individual expense items.

The record on appeal shows that Respondent accepted 29,800 of the listed items of expense as allowable, without examination—99 34/100 per cent of the listed items were allowed by respondent. 66/100 of one per cent of the items were questioned by Respondent. And that 66/100 of one per cent was questioned and charged as fraudulent without Respondent

having made any examination, inquiry, tabulation, calculation, computation, list or any "attempt to analyze the items". Nothing on which to base any charge of fraud or any tax.

III.

In the Decision of October 13, 1958 the Court below said:

> "The Appellant's main contention was that he could not lawfully be prosecuted for income tax evasion because, he alleges, before indictment his return was not audited to determine the exact amount of tax due by him". (Appendix A)

Petitioner's contention is also that in addition to no examination or audit; that Respondent made no effort to secure any information on which to base any charges of fraud or income tax evasion. (24, 25, 44, 84; Ex. pages 56a, 61a, 172, 416, 382)

Respondent did not comply with the requirements of the Internal Revenue Code of 1939 which is as follows:

> SECTION: 57:—As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.

There is no other provision in the Internal Revenue Code of 1939 for the determination of the correct amount of the tax. No one else has any authority to determine the correct amount of the tax.

The examination of the returns by the Commissioner, as provided in Section 57 provides the only legal way to determine the correct amount of the tax and to determine if a deficiency, as defined by Section 271 of the Code, existed.

Until the return was examined as provided by Section 57 and a deficiency, as defined by Section 271 was determined; there was no deficiency and no tax due and owing as charged in the indictment.

IV.

The confusion of the District Court is shown by the following charge to the jury:

> By the Court: Then this case is a very unusual one in the sense that it has two hundred separate transactions and it is probably beyond the possibility that even the most competent juror should bear in mind all the details of evidence. Therefore, of course, you probably wish to look at the case as a whole, get the perspective of it, what we call a bird's eye view of the situation. If you look at it in that way it does not become too difficult, but of course, it is for the jury to say what its decision will be. As I say, there are these two hundred items, and many of them are not deductible, as a matter of law. But the question, however, is whether the defendant is guilty of wilfully attempting to defeat the tax, which is perhaps a separate question. In other words, it is quite possible, and no doubt, it has happened, that somebody who takes a deduction on an income tax return which he had no right to take under the law, may have thought honestly that he had a right to take it. (Record on appeal, page 52).

The District Court was addressing a jury of seven women and five men who had no opportunity to become competent jurrors in income tax law. The record shows that not a single Internal Revenue law, rule or regulation was quoted or referred to. The record shows that the only law mentioned during the

entire trial was the last 63 words of Section 145(b) which the Judge read to the jury (Charge, Record on appeal, page 35).

Section 57, the only section of the Internal Revenue Code of 1939 which provides who shall determine the correct amount of the tax, and exactly how he shall determine it; was never mentioned to the jury. (See record on appeal).

The record on appeal shows Sections 271 and 272 which define a "deficiency" and provide for the determination of the deficiency and the assessment of any tax to be assessed under the Code were never mentioned; and the testimony of Respondent's agents shows that they had either never heard of Sections 271 and 272 or that they did not understand them, or act in compliance with them.

The agent charged in the indictment that the following sums were due and owing to the United States of America:

1943	$4,294.09	Record on appeal, page 4.
1944	5,452.20	Record on appeal, page 5.
1945	5,693.30	Record on appeal, page 6.
1946	8,195.09	Record on appeal, page 7.
1947	5,430.39	Record on appeal, page 8.

Under the Internal Revenue Code of 1939 that charge was simply not true.

V.

The record shows that the returns had been filed under Section 54. That the records, books and returns required under regulation 29.54-1 had been kept:

> "Every person subject to the tax, shall, for the purpose of enabling the Commissioner to deter-

> mine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1." (Sec. 29.54-1.)

The record shows that Petitioner did keep such records and Respondent did receive 30,000 such items which Respondent did not examine or audit for the purpose of determining the correct amount of the tax. (Sec. 57)

The record shows that Respondent told the Court that 29,800 of the listed items were allowable and the agent questioned 200 of the items. 66/100 of one per cent of the items without making any audit, tabulation, inquiry, calculation, computation, list or any attempt to analyze the items. (Reference to the agent's testimony cited above).

The record shows that the District Court said:

> BY THE COURT: "As to many of the items that he has deducted, they were deductible legally, properly if the facts which the defendant relates to you are accepted by you as true." (Record on Appeal, page 53).

That statement by the Court was in regard to the 66/100 of one per cent of the items questioned by the agent without any inquiry, audit, examination, tabulation, calculation, etc., etc. 29,800 of the items were found allowable without question, inquiry, audit, examination, etc., etc.

The District Court said:

> BY THE COURT: "There are many items here in the two hundred items which were deductible only if

> the evidence of the defendant and his explanation about them is accepted by you. But if you do not accept his testimony with regard to them you would be at liberty to find a verdict of guilty against him on one or more of the counts involved". (Record on Appeal, page 54).

That charge meant to the jury that although 29,800 of the 30,000 items were unquestionably legally allowable — 99 34/100 per cent — that if the jury did not accept the defendant's explanation of any of the other 66/100 of one per cent of the items here questioned without any inquiry, tabulation, calculation, attempt to analyze, list, audit or examine as required by Section 57; then the jury would be at liberty to find a verdict of guilty on one or more of the counts in the indictment. And the record on appeal shows that the indictment was known to be inaccurate and based on several sets of "assumed" figures. (Transcript of proceedings before Hon. W. Calvin Chesnut on May 27, 1952, pages 494-498).

And none of the figures in the indictment or testimony of the agents was based on any examination of the returns as required by the Internal Revenue Code. The whole prosecution was based on the "assumptions" of the agent who testified that he investigated from his automobile (343) and the safety deposit box (345).

And the record shows that although the jury was told by the judge:

> By the Court: "But if you do not accept his testimony with regard to them you would be at liberty to find a verdict against him on one or more of the counts involved". (Record on Appeal, page 54).

VI.

The Judge had refused to allow petitioner to present proof, facts and testimony by an expert accountant who had examined the books, records and returns (see Transcript of proceedings of June 3, 1952, pages 1366-1372, and Transcript of proceedings of June 4, 1952, pages 26-34). That examination showed no tax due (Transcript of June 4, 1952, pages 29-30).

The record on appeal shows that instead of proof of an examination, audit, and the determination of the correct tax; that the Respondent presented "assumptions" (493-497), false charges (indictment figures), perjury about the sale of the laundry (5 and 339), perjury about petitioner's contentions as to the use of some property (104 and 395-397), perjury about the deductibility of medical expenses in 1943 (498), the woods, number of feet of water front, and the depth of the water at the shore of some of Petitioner's property (99). Such proof was offered by Respondent in place of proof of an examination and determination of the correct amount of taxes due (Section 57).

VII.

The District Court was confused, and the Court below was confused:

> By the Court Below in the Decision of October 13, 1958, said: "The statute itself 'imposes' the tax".

Statute 57 provides for the determination of the correct amount of the tax and until there was a determination of the correct amount of the tax by the Commissioner (Section 57) and the determination of

a "deficiency" as defined by Section 271, and a final redetermination of that deficiency by the Tax Court as provided in Section 272, there can be no charge that any tax was due, owing and evaded as set out in the indictment in this case.

Both Courts are confused as to the provisions of the Internal Revenue Code of 1939 and their confusion has resulted in the illegal sentence complained of.

According to the Internal Revenue Code of 1939, Section 29.271-1:

> DEFICIENCY DEFINED.—Section 271 by its definition of the word "deficiency" provides a term which will apply to any amount of tax determined to be due in respect of a taxable year in excess of the amount of tax reported by the taxpayer for such year; or in excess of the amount reported by the taxpayer as adjusted by way of prior assessments, abatements, credits, refunds, or collections without assessment. In defining the term "deficiency" section 271 recognizes two classes of cases—one, where the taxpayer makes a return showing some tax liability; the other, where the taxpayer makes a return showing no tax liability, or where the taxpayer fails to make a return.
>
> When a case is considered for the first time, the deficiency is the excess of the amount determined to be the correct amount of the tax over the amount shown as the tax by the taxpayer on his return, or, if it is a case where no tax was reported by the taxpayer, the deficiency is the amount determined to be the correct amount of the tax.

And the law is again stated in a clear way by the Treasury Department Bulletin printed by the Commissioner for the guidance of taxpayers.

"When you file your income tax return on Form 1040, you have made your own determination of the income subject to tax and hence of the amount of tax you owe the Government. But your tax liability is not officially determined until your return has been examined.

The examination may disclose that you have overpaid your tax and are entitled to a refund. On the other hand, it may disclose that you apparently owe more tax, and this chapter tells you of your rights in such a case, outlining the procedures for protest and appeal which are open to you."

(TREASURY BULLETIN — YOUR FEDERAL INCOME TAX. Page 103.)

Under the applicable Internal Revenue Code of 1939 when my income tax returns had been filed reporting all gross income and all expenses (see Record on Appeal, pages 147-153, quoting Respondent's agents testimony that this had been done), I had complied with all the requirements of the Code and it was then the duty of the Commissioner to examine the returns and determine the correct tax, and I had a legal right to protest, and appeal, as set out above. (Sec. 271, 272). Appellee had no legal right to refuse to examine the returns; and to charge fraud without having made any examination.

There is no provision in the Code for a charge of income tax evasion before the return has been examined and a deficiency has been determined.

This prosecution under Section 145(b) was illegal before any tax was determined and imposed.

The Court below said in the Decision of October 13, 1958:

> "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Section 145(b)."

The Court below is just confused and has stated the law backwards.

The penalties provided by Section 145(b) cannot be applied on the "assumption", opinion, guess, and animosity of an agent. (Section 145(b)).

Those penalties can be applied only after the determination of the correct amount of the tax as provided by statute. (Sections 57, 271 and 272).

They can not be applied on guesses made by agents who have not examined, audited or inquired about the returns.

The Court below erred in deciding that:

> "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent evasion under Section 145(b)."

Petitioner submits that when Respondent testified that he had not examined, audited, inquired about, tabulated, calculated, listed or attempted to analyze the items on which any tax would have to be *computed;* and had not determined the correct tax or that there was any "deficiency" as defined by Section 271 of the Code; then there was no proof of fraudulent tax evasion and no one could say that any tax had been evaded.

The Court below notes that Petitioner argues that the Commissioner had not examined and passed

upon the 30,000 claimed deductions; a necessary requirement to determine whether the claimed deductions did result in any taxable income. Then the Court ignored the fact that such failure to pass upon the items proved that the Commissioner could not know that any understatement of taxable income in defendant's returns had occurred. Proof that the Court below erred when it said:

> "At the trial the Government did prove that, by making various false claims for deductions, a substantial understatement of taxable income had occurred." (Error in decision of October 13, 1958). (See Appendix A, infra).

When the Court below has made the above error then its conclusion:

> "This is sufficient basis for a criminal prosecution without first establishing the precise amount of defendant's tax indebtedness." (Decision of October 13, 1958, Appendix A, infra, is just another conclusion and error).

VIII.

The Court below erred in its decision when it said:

> BY THE COURT: "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion".

Petitioner submits that when Respondent testified that he had not examined, audited, inquired about, tabulated, calculated, listed or made any attempt to analyze the items on which any tax would have to be "COMPUTED"; and had not determined the correct tax, or any "deficiency" as defined by Section 271 of

the Code; then there was no proof of fraudulent tax evasion. That when he testified that none of those things had been done he could not say that the items were fraudulent and that any tax had been evaded. And these same comments apply to the following statements by the Court below:

> BY THE COURT: "The appellant also argues that the Commissioner had not, prior to the prosecution passed upon each of 30,000 claimed deductions. At the trial the Government did prove that, by making various false claims for deductions, a substantial understatement of taxable income in defendant's returns had occurred." (Decision of October 13, 1958).

Petitioner directs the attention of this Court to the complaint about the Commissioner not examining and passing upon each of the 200 items he charged as fraudulent in this prosecution. Without passing upon, examining, inquiring, auditing, calculating, listing or attempting to analyze the items how did the Commissioner prove to the Court that there had been "false claims" or that any "substantial understatement of taxable income in defendant's returns had occurred"?

And Petitioner asks this Court to consider the testimony of Respondent's agents that they made no examination as required by Section 57, determined no correct tax (Sec. 57), made no inquiry about the particular items (44), made no inquiry about the specific checks (382), made no tabulation of the items listed on the returns (24), made no calculation of the items (25), made no calculation of the depreciation on depreciable property (172 and 416), made no list of the items (Record on Appeal, page 84, Ex. page 61a), made no attempt to analyze any of the items (Record

on Appeal, page 84. Ex., page 56a). That testimony shows the error in the decision of the Court below, in which the Court said:

> "This is sufficient basis for a criminal prosecution without first establishing the precise amount of defendant's tax indebtedness." (Decision of October 13, 1958).
>
> "The sentence imposed here is not illegal in the sense that it is in excess of the punishment authorized by Section 145(b) of the Internal Revenue Code of 1939." (Decision of October 13, 1958).
>
> (That is no proper decision when Section 145(b) is not applicable under the expressed terms of Section 145(b) and under the facts presented by Respondent).
>
> "As we have shown, there is no merit in the contention that the Court was without jurisdiction to try the offense; nor is there any suggestion that the trial was, for any other reason, illegal, or that the defendant's constitutional rights were violated". (Appendix A, infra).

The record shows that the charge was based on an admitted lack of facts resulting from no inquiry about the items listed on the return (44), failure to comply with the requirements of Section 57 which requires the Commissioner to examine the return and determine the correct amount of the tax, no audit (Decision of Court below), no tabulation of the items (24), no inquiry about the specific checks (382), no list of the items (Record on Appeal, page 84; Ex., page 61a), no attempt to analyze the questioned items (Record on Appeal, page 84; Ex., page 56a), no determination of a deficiency (Section 271 and no notice or opportunity to appeal to the Tax Court Section 272).

Petitioner contends that this whole proceeding was illegal from the time the Commissioner failed to examine the returns that had been filed and failed to determine the correct amount of the tax (Section 57), and then failed to compute the tax as required by Sections 271 and 272 of the Code.

The applicable Internal Revenue Laws clearly set out the kind of returns to be filed, Sections 41, 51, 54 of the Code. (Appendix C) Sections 57, 271 and 272 then clearly set out exactly how the correct tax is to be determined. The lower courts completely ignored the law and instead of determing a deficiency if one was found to exist they failed to examine the returns to ascertain the facts. They assessed no deficiency and charged fraud without making any attempt to comply with the requirements of the Code.

> THE COURT BELOW SAID: "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution under Sec. 145 (b)."
>
> "The Commissioner had not, prior to the prosecution passed upon each of the 30,000 claimed deductions."
>
> "This is sufficient basis for a criminal prosecution without first establishing the precise amount of defendant's tax indebtedness."

Reference to the applicable Internal Revenue Laws (Appendix C, infra) shows that is no fair, just, or reasonable, interpretation of the law.

Sections 57, 271, 272 specifically provide for a situation such as this. They provide for the examination of the returns and the determination of the correct tax. They do not provide for a criminal

prosecution on the "assumptions" of an agent made without any examination or determination of the tax.

REASONS FOR GRANTING THE WRIT

Petitioner contends that for the reasons, and on the facts quoted above, this criminal proceeding was unjust and unfair from the filing of the reckless, unvestigated, "assumed" charges for the indictment, to the decision of the Court below. The sentence was illegal and should be voided by this Court.

This Court has full power and authority to correct this injustice and it is the duty of this Court to correct the erroneous interpretation of the Court below.

ARGUMENT

This is a very important case. The Court below has decided that a taxpayer can be fined and imprisoned for income tax evasion before the Commissioner has made any examination, audit, or inquiry about the return which was filed, or made any examination to determine the correct amount of the tax, or if there was any deficiency in tax.

> THE COURT BELOW SAID: "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b)."

When there has been no examination, tabulation, inquiry, audit, computation or assessment of the tax; and no determination of the correct tax; there has been no investigation on which to base a fraud charge. A precise computation is necessary. Guesses will not suffice. The fraud charge in this case is nothing but the pique and "assumption" of an agent made as he testified,

without any investigation of the returns, and in total disregard of the requirements of the Internal Revenue Code, Sections 57, 271, 272. (Appendix C, *infra*).

In this case the Courts below have so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. The undisputed testimony of the Respondent in the record proves this.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. FUNKHOUSER, *Petitioner*,
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December 1, 1958.